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## IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of: Steve J. McKinnon et al.  
Serial No. 10/034,431  
Filed: 12/27/2001  
For: **DYNAMIC PRESENCE MANAGEMENT**

Examiner: Hossain, Tanim M.  
Art Unit: 2145

Mail Stop Appeal Brief -- Patents  
Commissioner for Patents  
PO Box 1450  
Alexandria, VA 22313-1450

Sir:

An **APPEAL BRIEF** is filed herewith. Appellant also encloses a credit card form authorizing payment in the amount of \$500.00 as required by 37 C.F.R. § 1.17(c). If any additional fees are required in association with this appeal brief, the Director is hereby authorized to charge them to Deposit Account 50-1732, and consider this a petition therefor.

**APPEAL BRIEF**

**(1) REAL PARTY IN INTEREST**

The real party in interest is the assignee of record, i.e., Nortel Networks Limited of 2351 Boulevard Alfred-Nobel, St. Laurent, Quebec Canada H4S 2A9, which is wholly owned by Nortel Networks Corporation, a Canadian corporation.

**(2) RELATED APPEALS AND INTERFERENCES**

There are no related appeals or interferences to the best of Appellant's knowledge.

**(3) STATUS OF CLAIMS**

Claims 1-38 were rejected with the rejection made final on September 6, 2005.

Claims 1-38 are pending and are the subject of this appeal.

**(4) STATUS OF AMENDMENTS**

All amendments have been entered to the best of Appellant's knowledge.

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**(5) SUMMARY OF CLAIMED SUBJECT MATTER**

Claims 1, 15, and 27 are essentially identical independent claims, albeit in method, system, and software form, respectively. The independent claims correspond to the mechanism to obtain state information bearing on the presence of a user and to create service logic configured to instruct an associated presence server to control communication associated with user based on presence. The state information is derived from any type of presence detection system capable of detecting the physical presence, status, or availability of the user or device associated with the user (claim 1, element a). The state information is received and the service logic is created at the presence system (claim 1, element b). Once created, the service logic is delivered to the presence server to control communications in a specified manner (claim 1, element c). As such, generation of the service logic is distributed rather than being centralized at the presence server (paragraph 0005). For example, the service logic may be configured to control registrations for communication devices associated with the user so that incoming calls directed to the user are directed to different communication devices based on a user's presence (claim 1, element b and paragraph 0007).

With reference to Figure 1 and paragraphs 0015 and 0016 of the detailed description of the preferred embodiments, support for the invention is clearly provided. A presence detection system (12) is provided and includes a presence detection device (14) capable of detecting the presence of a user and generating state information based on the presence of the user (claim 1, element a)...the state information is processed by presence function (16) of the presence detection system (12) to create service logic configured to control communications associated with the user in a specified manner (claim 1, element b)...the service logic is delivered from the presence function (16) to a presence server (18) (claim 1, element c)...the service logic may be processed to provide information to other services in association with the user or stored such that these services can access the service logic and respond accordingly (claim 1, element c).

**(6) GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL**

A. Claims 1-8, 11-22, 25-34, 37, and 38 were rejected under 35 U.S.C. § 102(e) as being anticipated by Boyer et al. (hereinafter "Boyer").

B. Claims 9, 10, 23, 24, 35, and 36 were rejected under 35 U.S.C. § 103(a) as being unpatentable over Boyer in view of McDowell et al. (hereinafter "McDowell").

**(7) ARGUMENT****A. Introduction**

For the rejections under 35 U.S.C. § 102(e), the Patent Office has not shown where all of the elements of independent claims 1, 15, and 27 are shown with the requisite particularity to sustain an anticipation rejection. Specifically, Boyer fails to teach receiving state information and creating service logic based on this state information *at the presence detection system*. Boyer also fails to disclose providing the service logic from the presence detection system to a presence service to effectively distribute generation of the service logic. Since these elements are recited in the claims, and Boyer does not disclose these elements, independent claims 1, 15, and 27 are not anticipated. Further, claims 2-8, 11-14, 16-22, 25, 26, 28-34, 37, and 38, which depend on claims 1, 15, and 27, are not anticipated by Boyer.

For the rejections under 35 U.S.C. § 103(a), in light of Boyer and McDowell, the Patent Office has failed to establish *prima facie* obviousness. In particular, nothing in McDowell cures the deficiencies of Boyer. Neither Boyer nor McDowell, teach creating the service logic in the presence detection system and providing the service logic from the presence detection system to the presence service as recited in the claims for the present invention. Even if Boyer and McDowell disclosed each of the elements in the claims, a point which Appellant does not concede, there is no motivation to combine the teachings of Boyer and McDowell.

The Patent Office is improperly combining the references using hindsight to reconstruct the claimed invention by using Appellant's disclosure as a template. In particular, the Patent Office has not provided any evidence to prove the motivation to combine the references, and the Patent Office is ignoring portions of the references which teach away from the combination.

**B. Summary of the References****1. U.S. Patent Application No. 2002/0143876 to Boyer**

Boyer discloses a system referred to as ConnectIcon View. ConnectIcon View is employed to establish collaborative communications between a plurality of participants in a group. Specifically, it is a dynamic visual representation of the participants of a group being invited to communicate together with their presence information, a list of documents, and URLs (Uniform Resource Locators) to be examined, and a set of mechanisms (e-mail, chat, voice, and

the like) to initiate communication, each of which can be billed to the originator or otherwise as desired. The available presence information allows a user to employ the best mode of communicating for the instant purpose, namely, either asynchronous communication or synchronous communications.

Notably, Boyer teaches that the service logic is created within the Softswitch Programmable Feature Server (SPFS) (201), which has a Service Logic Execution Environment (SLEE). This SPFS (201) collects the presence information and generates the service logic that instructs the SLEE to control the communications associated with the user based on presence. Since the SPFS is generating the service logic, the presence detection system described in paragraph 0027 of Boyer is not generating the service logic (see paragraphs 0032, 0033, and 0041).

## **2. U.S. Patent Application No. 2002/0035605 to McDowell**

McDowell discloses a technique for integrating presence determination, location determination, instant messaging, and mobile commerce into a functionally seamless system, which may be implemented as an added component of a wireless provider's network. The integrated system enables instant messaging and mobile commerce as a centralized gateway attached to the networks of a large number of wireless providers. The centralized gateway facilitates a business model, which individual wireless carriers enter into by-lateral agreements with specific Internet content providers. McDowell discloses the presence system similar to that described in the "Background Of The Invention" section of Appellant's present invention. Nothing in McDowell teaches or suggests the creation of service logic at a presence detection system or providing the service logic to a presence server.

### **C. The Standards for Establishing Anticipation**

Section 102 of the Patent Act provides the statutory basis for an anticipation rejection and states *inter alia*:

A person shall be entitled to a patent unless

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(e) the invention was described in - (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the

invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for the purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language. . . .

The Federal Circuit's test for anticipation has been set forth numerous times. "It is axiomatic that for prior art to anticipate under 102 it has to meet every element of the claimed invention." *Hybritech Inc. v. Monoclonal Antibodies, Inc.*, 802 F.2d 1367, 1379 (Fed. Cir. 1986). This standard has been reinforced. "To anticipate a claim, a reference must disclose every element of the challenged claim and enable one skilled in the art to make the anticipating subject matter." *PPG Indus. Inc. v. Guardian Indus. Corp.*, 75 F.3d 1558, 1577 (Fed. Cir. 1996) (citations omitted). Further, "a finding of anticipation requires that the publication describe all of the elements of the claims, arranged as in the patented device." *C.R. Bard Inc. v. M3 Sys. Inc.*, 157 F.3d 1340, 1349 (Fed. Cir. 1998) (emphasis added and citations omitted).

#### **D. Claims 1-8, 11-22, 25-34, 37, and 38 Are Not Anticipated by Boyer**

Boyer teaches creation of the service logic in the SPFS (201). The SPFS is not the same as the presence detection system. That is, in Appellant's system, the presence detection system is the keyboard monitor, mouse tracker, video camera, or the like (see paragraph 0018 of the specification as filed) and would not include the SPFS. In response, the Patent Office states:

The creation and execution of service logic in a system, to control a certain process in that system, is an inherency, native to any client-server system. Any computer process, in which communication flows a certain way, as a result of some criteria, employs the use of service logic to achieve that end. Additionally, even if service logic were not a global trait of computer function, a point the examiner does not concede, the specifically disclosed use of service logic in the SPFS would constitute the use of service logic as a whole, as the SPFS is part of the system (Office Action of September 9, 2005, page 6, lines 14-19).

Appellant does not dispute that there is service logic in Boyer's system. However, Boyer does not teach that the service logic is created in the presence detection system, as recited in the claims, because Boyer teaches that the service logic is created in the SPFS. Since Boyer teaches that the service logic is created in the SPFS and not in the presence detection system, Boyer cannot anticipate the claims.

If the Patent Office maintains that the SPFS (201) is part of the presence detection system, then Boyer does not teach providing the service logic from the presence detection system to the associated presence service as recited in the claims. The Patent Office opines that the providing element is taught by Boyer at paragraphs 0032 and 0041. Appellant respectfully traverses this assertion. Paragraph 0032 states in full:

[0032] Not shown in this diagram is an optional application that detects user presence activity on the Soft Endpoint. For a personal computer (PC), these are keystrokes and mouse events. Messages are sent from the application to the User Agent 203 when moving from idle to using the keyboard/mouse, or when there has been no activity for a user configurable time period (e.g., approximately 5 minutes). Other events that may be employed to indicate participant presence or not are, for example, logging on or off a system or service, timing out, i.e., no activity [sic] on the system or service for a prescribed interval, telephone on-hook or off-hook indication, a wireless connection or disconnect, or the like.

While this passage discusses various presence detection devices, the optional application that detects user presence activity is not creating the service logic. Likewise, the User Agent (203) is part of the SPFS (201) (see Boyer paragraph 0033 and Figure 2). Thus, this paragraph does not teach providing the service logic from the presence detection system to the presence service as recited in the independent claims.

Likewise, Boyer paragraph 0041 states in full:

[0041] Briefly, the User Agent 203 is a WEB interface to a database that stores information, i.e., presence information, on users that describes where and how the users are present in the network. This information can be used to indicate availability and the best way to contact, i.e., the best mode of communicating with, a user. Access to presence information is restricted based on user preferences that are stored in the User Agent 203. The User Agent 203 uses a LDAP database 206 to store the data, but direct access to the database is not necessary. Servlets in the User Agent 203 are used to request that presence data be created or changed and to request data or subscribe to presence data (a subscription to presence data means that the subscriber is notified when that data changes).

Again, the User Agent (203) is part of the SPFS (201) and the provision of service logic to the User Agent (203) is not the same as providing the service logic to an associated presence service as recited in the claims. Thus, even if the SPFS (201) is part of the presence detection system and the generation of service logic within the SPFS is the same as the recited creating of the service logic in the at least one presence detection system (a point Appellant does not concede,

but makes for the sake of rebutting a possible Patent Office interpretation), then Boyer still does not teach or suggest providing the service logic from the presence detection system to the presence service as recited in the claims.

Each of the independent claims 1, 15, and 27 include creating the service logic in the presence detection system and providing the service logic from the presence detection system to the presence service. Since Boyer does not show at least one of these elements, Boyer cannot anticipate the independent claims. Since the independent claims are not anticipated, the dependent claims are not anticipated. As such, claims 1-8, 11-22, 25-34, 37, and 38 define patentable subject matter.

#### **E. The Standards for Establishing Obviousness**

Section 103(a) of the Patent Act provides the statutory basis for an obviousness rejection and reads as follows:

A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Courts have interpreted 35 U.S.C. § 103(a) as a question of law based on underlying facts. As the Federal Circuit stated:

Obviousness is ultimately a determination of law based on underlying determinations of fact. These underlying factual determinations include: (1) the scope and content of the prior art; (2) the level of ordinary skill in the art; (3) the differences between the claimed invention and the prior art; and (4) the extent of any proffered objective indicia of nonobviousness.

*Monarch Knitting Mach. Corp. v. Sulzer Morat GmbH*, 45 USPQ2d 1977, 1981 (Fed. Cir. 1998) (internal citations omitted).

Once the scope of the prior art is ascertained, the content of the prior art must be properly combined. Initially, the Patent Office must show that there is a suggestion to combine the references. *In re Dembiczak*, 175 F.3d 994 (Fed. Cir. 1999). Even if the Patent Office is able to articulate and support a suggestion to combine the references, it is impermissible to pick and choose elements from the prior art while using the application as a template. *In re Fine*, 837



F.3d 1071 (Fed. Cir. 1988). To reconstruct the invention by such selective extraction constitutes impermissible hindsight. *In re Gorman*, 933 F.2d 982 (Fed. Cir. 1991). After the combination has been made, for a *prima facie* case of obviousness, the combination must still teach or fairly suggest all of the claim elements. *In re Royka*, 490 F.2d 981 (C.C.P.A. 1974); MPEP § 2143.03.

Some elements may be inherent within the reference. “To establish inherency, the extrinsic evidence ‘must make clear that the missing descriptive matter is necessarily present in the thing described in the reference, and that it would be so recognized by persons of ordinary skill.’” *In re Robertson*, 169 F.3d 743, 745 (Fed. Cir. 1999) (quoting *Continental Can Co. v. Monsanto Co.*, 948 F.2d 1264, 1268 (Fed. Cir. 1991)). “The mere fact that a certain thing may result from a given set of circumstances is not sufficient.” *Id.* (citation and quotation omitted). Thus, the possibility that an element may be derived from the reference is insufficient to establish that said element is inherent to the reference.

Whether an element is implicitly or explicitly taught by a reference or combination of references is open to interpretation. While the Patent Office is entitled to give claim terms their broadest reasonable interpretation, this interpretation is limited by a number of factors. First, the interpretation must be consistent with the specification. *In re Hyatt*, 211 F.3d 1367, 1372 (Fed. Cir. 2000); MPEP § 2111. Second, the broadest reasonable interpretation of the claims must also be consistent with the interpretation that those skilled in the art would reach. *In re Cortright*, 165 F.3d 1353, 1359, (Fed. Cir. 1999); MPEP § 2111. Finally, the interpretation must be reasonable. *In re American Academy of Science Tech Center*, 367 F.3d 1359, 1369 (Fed. Cir. 2004); MPEP § 2111.01. This means that the words of the claim must be given their plain meaning unless Appellant has provided a clear definition in the specification. *In re Zletz*, 893 F.2d 319, 321 (Fed. Cir. 1989).

If a claim element is missing after the combination is made, then the combination does not render obvious the claimed invention, and the claims are allowable. As stated by the Federal Circuit, “[i]f the PTO fails to meet this burden, then the Appellant is entitled to the patent.” *In re Glaug*, 283 F.3d 1335, 1338 (Fed. Cir. 2002).

**F. Claims 9, 10, 23, 24, 35, and 36 Are Not Obvious in Light of the Combination of Boyer and McDowell**

There is no evidence in the record to support the motivation to combine the references, as required by the Federal Circuit. The Patent Office asserts that “[b]ecause Boyer and McDowell

seek to solve the same problem, and because the use of GPS would add effectiveness to achieve the goal of Boyer's invention, the combination of the features of the two inventions would have been obvious to one of ordinary skill in the art" (Office Action of September 9, 2005, page 7, lines 5-8). This asserted motivation lacks any evidence in support thereof. Merely because a combination is possible or the references are in the same field of endeavor does not make a combination obvious. MPEP § 2143.01. The Federal Circuit imposed the actual evidence standard to combat impermissible hindsight reconstruction. The Patent Office's continued failure to provide the required evidence indicates that this combination relies on impermissible hindsight reconstruction. As such, the combination is improper. Since the combination is improper, the rejection is improper. Since the rejection is improper, the claims are non-obvious and allowable. Appellant requests withdrawal of the § 103(a) rejection on this basis.

Even if the combination is proper, a point which Appellant does not concede, the combination does not establish obviousness because the combination does not teach creating the service logic in the presence detection system and providing the service logic from the presence detection system to the presence service as recited in the claims. That is, as explained above, Boyer does not teach or suggest this element. Nothing in McDowell cures the deficiencies of Boyer. Since the references individually do not teach or suggest the claim element, the combination of references cannot teach or suggest the claim element. Since the combination does not teach or suggest the claim element, the Patent Office has not established obviousness and the claims are allowable. Appellant requests withdrawal of the § 103(a) rejection on this basis as well.

#### **G. Conclusion**

Boyer fails to disclose or suggest receiving state information bearing on the presence of a user and creating service logic based on the user at a presence detection system. Boyer further fails to disclose providing the creative service logic from the presence detection system to an associated presence service. McDowell also fails to disclose or suggest these elements. As such, Boyer and McDowell, alone or in combination, fail to disclose or suggest the claimed invention. Appellant respectfully requests that the Board reverse the Examiner and instruct the Examiner to allow the pending claims 1-38.

Respectfully submitted,

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Date: March 14, 2006

Attorney Docket: 7000-062

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**(8) APPENDIX**

## 1. A method comprising:

- a) receiving state information bearing on presence of a user, wherein receiving occurs at at least one presence detection system;
- b) creating service logic based on the state information, the service logic created at the at least one presence detection system and configured to instruct an associated presence service to control communications associated with the user based on the presence of the user; and
- c) providing the service logic from the at least one presence detection system to the associated presence service to distribute generation of the service logic.

2. The method of claim 1 wherein the presence of the user relates to at least one of the group consisting of physical presence, availability, and status of the user or a device associated with the user.

3. The method of claim 1 wherein the service logic is configured to instruct the presence service to register a first communication device associated with the user to receive communications when the state information is a first state.

4. The method of claim 3 wherein the service logic is configured to instruct the presence service to register a second communication device associated with the user to receive communications when the state information is a second state.

5. The method of claim 1 wherein the state information is provided to the associated presence service with the service logic.

6. The method of claim 1 wherein the state information indicates whether a screen saver is active or inactive.

7. The method of claim 1 wherein the state information indicates whether the user is using a device.

8. The method of claim 1 wherein the state information indicates whether a device associated with the user is activated.
9. The method of claim 1 wherein the state information indicates whether the user is physically present in an area.
10. The method of claim 1 wherein the state information indicates whether the user is physically proximate to a device.
11. The method of claim 1 wherein the service logic is active and therefore configured to cause the presence service to immediately react in a manner to control communications associated with the user.
12. The method of claim 1 wherein the service logic is passive and therefore configured to cause the presence service to react in a manner to control communications associated with the user upon the associated presence service reacting to a request bearing on communications with the user.
13. The method of claim 1 further comprising executing the service logic at the associated presence service to control communications associated with the user.
14. The method of claim 13 wherein the executing step further comprises controlling the communications associated with the user based on the service logic in response to an application attempting to communicate with the user.
15. A presence detection system comprising:
  - a) an interface adapted to facilitate communications with a communication service;and
  - b) a control system associated with the interface and adapted to:
    - i) receive state information bearing on presence of a user;

- ii) create service logic based on the state information, the service logic configured to instruct an associated presence service to control communications associated with the user based on the presence of the user; and
- iii) provide the service logic from the presence detection system to the associated presence service to distribute generation of the service logic.

16. The system of claim 15 wherein the presence of the user relates to at least one of the group consisting of physical presence, availability, and status of the user or a device associated with the user.

17. The system of claim 15 wherein the service logic is configured to instruct the associated presence service to register a first communication device associated with the user to receive communications when the state information is a first state.

18. The system of claim 17 wherein the service logic is configured to instruct the associated presence service to register a second communication device associated with the user to receive communications when the state information is a second state.

19. The system of claim 15 wherein the state information is provided to the associated presence service with the service logic.

20. The system of claim 15 wherein the state information indicates whether a screen saver is active or inactive.

21. The system of claim 15 wherein the state information indicates whether the user is using a device.

22. The system of claim 15 wherein the state information indicates whether a device associated with the user is activated.

23. The system of claim 15 wherein the state information indicates whether the user is physically present in an area.

24. The system of claim 15 wherein the state information indicates whether the user is physically proximate to a device.

25. The system of claim 15 wherein the service logic is active and therefore configured to cause the associated presence service to immediately react in a manner to control communications associated with the user.

26. The system of claim 15 wherein the service logic is passive and therefore configured to cause the associated presence service to react in a manner to control communications associated with the user upon the associated presence service reacting to a request bearing on communications with the user.

27. A computer readable medium having software comprising instructions for a computer to:

a) receive state information bearing on presence of a user at at least one presence detection system;

b) create service logic based on the state information, the service logic created at the at least one presence detection system and configured to instruct an associated presence service to control communications associated with the user based on the presence of the user; and

c) provide the service logic from the at least one presence detection system to the associated presence service to distribute generation of the service logic.

28. The computer readable medium of claim 27 wherein the presence of the user relates to at least one of the group consisting of physical presence, availability, and status of the user or a device associated with the user.

29. The computer readable medium of claim 27 wherein the service logic is configured to instruct the presence service to register a first communication device associated with the user to receive communications when the state information is a first state.

30. The computer readable medium of claim 29 wherein the service logic is configured to instruct the presence service to register a second communication device associated with the user to receive communications when the state information is a second state.

31. The computer readable medium of claim 27 wherein the state information is provided to the associated presence service with the service logic.

32. The computer readable medium of claim 27 wherein the state information indicates whether a screen saver is active or inactive.

33. The computer readable medium of claim 27 wherein the state information indicates whether the user is using a device.

34. The computer readable medium of claim 27 wherein the state information indicates whether a device associated with the user is activated.

35. The computer readable medium of claim 27 wherein the state information indicates whether the user is physically present in an area.

36. The computer readable medium of claim 27 wherein the state information indicates whether the user is physically proximate to a device.

37. The computer readable medium of claim 27 wherein the service logic is active and therefore configured to cause the associated presence service to immediately react in a manner to control communications associated with the user.

38. The computer readable medium of claim 27 wherein the service logic is passive and therefore configured to cause the associated presence service to react in a manner to control communications associated with the user upon the associated presence service reacting to a request bearing on communications with the user.



**(9) EVIDENCE APPENDIX**

Appellant relies on no evidence, thus this appendix is not applicable.

**(10) RELATED PROCEEDINGS APPENDIX**

As there are no related proceedings, this appendix is not applicable.

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